IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-740077-D2 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Udardo BETANCOURT

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1877

Udardo BETANCOURT

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1

By order dated 2 January 1970, an Examiner of the United States Coast Guard at New York, N.Y., entered an order of admonition in the captioned case upon finding Appellant guilty of misconduct. The specification found proved alleges that while serving as a night pantryman on board SS SANTA PAULA under authority of the document above captioned, on or about 4 September 1969, while the vessel was at Aruba, N.A., Appellant wrongfully used foul and abusive language to another crewmember.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of one witness.

In defense, Appellant offered in evidence his own testimony, that of one witness, a voyage record of SANTA PAULA, and a photograph.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order of admonition.

The entire decision was served on 9 January 1970. Appeal was timely filed on 15 January 1970. Although Appellant had until 24 August 1970 to do so, he has not added to his original notice of appeal.

FINDINGS OF FACT

On 12 September 1969, Appellant was serving as a night pantryman on board SS SANTA PAULA and acting under authority of his

document while the ship was at Aruba, N.A.

At about noon on that date, the ship's boatswain, E. Ablahani, was standing ashore facing the ship. Appellant went down the gangway "hurling" imprecations at Ablahani and calling him "m f ." When the second officer intervened Appellant continued "cursing out" Ablahani and threatened to kill him or have him killed. The second officer finally terminated the incident.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that the findings are not based on substantial evidence and that the burden of proof was not sustained.

APPEARANCE: Rolnick, Tabak, Exratty & Huttner, New York, N.Y., by Bernard Rolnick, Esq.

I

The Examiner's findings were based upon the testimony of the second officer. The second officer was not a party to, nor interested in, an intra-union dispute with which much of the lengthy record in this case is irrelevantly concerned. His testimony was clear and straightforward. It constitutes substantial evidence upon which findings can properly be based, and in producing the evidence of this witness the burden of proof was successfully carried. Appellant's grounds for appeal are without merit, but there are two procedural problems and one of substantive law raised by the record of this case.

II

The first procedural problem involves the Examiner's findings of fact. In Finding No. 4 it is said, "Respondent came down the gangway cursing the boatswain. (The language is set forth in the testimony of Second Officer Edwards and need not be repeated here.) He also used threatening language to the Boatswain..." I have no hesitancy in incorporating an examiner's findings by reference in a decision on appeal, but I do not consider a finding that certain language charged to a party can be found in the testimony of a witness is a proper finding. It is certain that in this Decision I could not make such a finding by reference. It seems equally certain that an examiner, whose decision whether appealed or not, is a public record, may not do so. This error has been corrected by my Findings above which are based upon examination of some thirty pages of testimony by the witness.

III

The second procedural problem is raised by the disposition of what was originally a second specification in this case. This specification alleged that on the occasion in question Appellant did "wrongfully threaten to kill a fellow crewmember, E. ABLAHANI."

The Examiner's finding quoted above declares only that Appellant "used threatening language" to Ablahani. My findings, based on the testimony to which the Examiner refers us, are that Appellant threatened to kill Ablahani or have him killed. Of this, the Examiner also says, "there was no failure to prove the language but there was failure to prove a threat as an assault upon Mr. Ablahani." This specification was dismissed but "Inasmuch as the threatening language was proved it is deemed included in the allegation of foul and abusive language in the First Specification." If a specification is dismissed in whole, and not merely in part, I do not see how any part of it can survive so as to be "deemed included" in another specification. While threatening language may also be foul or abusive, I also do not see how a threat, alleged and proved only as a threat, can be "deemed included" in an allegation of "foul and abusive" language.

IV

The substantive problem, actually twofold, arises in the Examiner's language quoted just above. It is true, as the Examiner says, that the threatening language proved was not proved to be an "assault." First, of course, it was not charged as an assault and therefore there was no failure of proof when it was not proved as an assault. Second, and more basic substantively, is the consideration that mere language, without more, never constitutes an assault. (Citations are not necessary.)

Other language of the Examiner must also be considered in dealing with the second part of the substantive question. It is said, "In order to establish an assault the addressee [of language] must be shown to have been reasonably put in apprehension of his safety." No citations are given.

Insofar as language is concerned, as I have pointed out above, no matter what apprehension or fear may have been instilled into an addressee of mere language without more, there is no assault. On the other hand there are varieties of assault, civil and criminal. In certain cases fear or apprehension is an essential element; in other cases it is irrelevant.

It is not timely to enter upon an exhaustive discussion of the law of assault; it suffices to note briefly that the relevant matters to be considered in determining whether an act is "assault"

in these proceedings are the actuality of the effort to batter and when the effort is only apparent, the apprehension of the victim.

V

The problem that actually faced the Examiner here, I believe, is whether the threat to kill made by Appellant was real or not to be taken seriously. The Examiner adverts to testimony of the second officer that he did not believe that Appellant meant what he said. The Examiner also noted that Ablahani was not called to testify. If the Examiner was intimating that testimony of Ablahani that he was put in fear or apprehension would have constituted the threat as an assault he was wrong; but what I think the Examiner meant was that without testimony from Ablahani that he believed that the threat to kill was seriously uttered the proved language could not be found to be a proved threat. With this view I agree, but obviously the question of assault is not relevant.

ORDER

The order of the Examiner dated at New York, N.Y., on 2 January 1970, is AFFIRMED.

T. R. SARGENT
Vice Admiral, United States Coast Guard
Acting Commandant

Signed at Washington, D. C., this 4th day of May 1972.

INDEX